IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1619

* * *

DELBERT ALLEN GIBSON
AND A. L. REEVES, JR.,

Petitioners

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For A Writ Of Certiorari
To The Texas Court Of Criminal Appeals

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES The State of Texas, Respondent herein, by and through its duly authorized Attorney General, and files this its Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, styled *Gibson and Reeves v. State of Texas*, is reported at 532 S.W.2d 69 (Tex.Crim.App. 1975).

JURISDICTION

The petition appears to have been timely filed and to meet this Court's formal jurisdictional requirements. Respondent denies, however, that the criteria set out in Supreme Court Rule 19, governing the exercise of this Court's discretionary *certiorari* jurisdiction, have been met.

QUESTIONS PRESENTED

1. Whether Petitioners were denied due process of law by the trial court's failure to make a judicial determination of the voluntariness of their pleas of guilty, upon timely request.

2. Whether Petitioners were denied due process of law where the trial court refused their timely Motion to Withdraw [their pleas] when the trial court would not follow the recommendation of the prosecutor.

3. Whether Art. 26.13, Texas Code of Criminal Procedure (1973) as applied, denied Petitioners due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As the Petitioners' brief correctly asserts, this petition involves the provision of Art. 26.13, Texas Code of Criminal Procedure. However, the Petitioners' brief is in error as to the reading of Art. 26.13, Texas Code of Criminal Procedure, in effect at the time of the Petitioners' guilty pleas, November 19, 1973.

Effective January 1, 1966, Art. 26.13 of the Texas Code of Criminal Procedure provided as follows:

> "If the defendant pleads guilty, or enters a plea of nolo contendere, he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is sane, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt."[1]

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[1]Acts 1965, 59th Leg., p. 317, ch. 722, §1. Subsequently, this article was amended twice by the Texas Legislature. Effective January 1, 1974, Art. 26.13 of the Texas Code of Criminal Procedure was amended to read as follows:

> "If the defendant pleads guilty, or enters a plea of nolo contendere, he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is mentally competent, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt." Acts 1973, 63rd Leg., p. 969, ch. 399, §2 (a).

Effective June 19, 1975, Art. 26.13 of the Texas Code of Criminal Procedure was amended to read as follows:

> "(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:
>
> (1) the range of punishment attached to the offense; and
>
> (2) the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court.
>
> (b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.

STATEMENT OF FACTS

The statement of facts in Petitioners' brief is a substantially correct rendition of the facts at issue in this case.

ARGUMENT AND AUTHORITIES

I.

The Defendants' Guilty Pleas Were Not Involuntary And The Defendants Were Not Denied Their Federally Protected Constitutional Rights.

Petitioners contend they were "guaranteed" probation if they pled guilty. However, the record reflects that before accepting the guilty plea of Gibson, the following exchange took place in open court between Gibson and the trial judge:

"THE COURT: Have you been persuaded to plead guilty against your will?

"THE DEFENDANT: No, sir.

"THE COURT: Have you been promised anything in this case--

"THE DEFENDANT: No, sir.

---

[1](con'd.)

(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court." Acts 1975, 64th Leg., p. 909, ch. 341, §3.

"THE COURT: --to plead guilty. You know that if you plead guilty in this case, and the evidence shows that you're guilty, that the attorneys may make a recommendation to the Court, and that's all that is, a recommendation. I do not have to take the recommendation.

"THE DEFENDANT: Yes, sir.

"THE COURT: I will consider it, but that's all; just consider it. If they recommend that you be granted probation, I may deny that recommendation and send you to the penitentiary for as much as twelve years. You understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Knowing all that, do you still plead guilty in this case?

"THE DEFENDANT: Yes, sir."

The trial judge then inquired of Reeves:

"THE COURT: Has anyone promised you anything to plead guilty?

"THE DEFENDANT: No, sir.

". . .

"THE COURT: I don't know whether I told A. L. Reeves or not, but the recommendation of the District Attorney or the State is nothing more than a recommendation. He may recommend probation and I could still send you to the penitentiary.

"THE DEFENDANT: Yes, sir."

As the opinion of the Texas Court of Criminal Appeals reflects, the following statement was made by the trial judge after accepting the pleas of guilty:

> "In addition to announcing judgment here, if you should be granted probation, if you should be, and don't think that I'm saying that you're going to be because I don't know, if your records are not sufficient, your past records are not sufficient to warrant what I think would be a good probation risk, well, I will send you to the Department of Corrections. . . ."

At the hearing on the motion for a new trial, the Defendants' attorney testified:

> "I talked with these Defendants about it and I said, 'Regardless of what the District Attorney does, this judge has the power to do whatever he wants to do within what we're talking about.' "
> (R at 146, 147.)

This procedure should be compared with that condemned by this Court in *Boykin v. Alabama*, 395 U.S. 246 (1969), where the judge asked no questions concerning the defendant's plea. Consequently, Petitioners have no factual basis for their contention that they were "guaranteed" probation if they pled guilty.

Brady v. United States, 397 U.S. 742 (1970), established the standard to be used in determining the voluntariness of a plea of guilty:

> "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must

> stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." Citing *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957) . . . . "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision."

This standard has been utilized and correctly applied by the Texas courts. *See, e.g., Ex Parte Shuflin*, 528 S.W. 2d 610 (Tex.Crim.App. 1975). In the instant case, the highest Texas criminal appellate court applied such standard and found both Petitioners' pleas to have been voluntarily entered.

A careful reading of the records will show this Court, as it did the court below, that the assertions by the Petitioners that they were "guaranteed" probation are not established as undisputed fact.

II.

The Provisions Of Federal Rule 11 Of The Federal Rules Of Criminal Procedure Or The American Bar Association Standards Of Criminal Justice Are Not Mandated By The Fifth, Sixth, Or Fourteenth Amendments To The Constitution.

The contention that failure to follow the dictates of Rule 11 of the Federal Rules of Criminal Procedure and the American Bar Association Standards for the Administration of Criminal Justice raises an issue of

federal constitutional dimension is patently without merit.

The Petitioners' reliance on *Santobello v. New York*, 404 U.S. 264 (1971), is misplaced since the issue in *Santobello* was the failure of the State of New York to honor its agreement that no recommendation would be made by the prosecutor. In *Santobello*, a recommendation was made and the agreement was thereby breached. That is not the case here. The Petitioners bargained for the prosecutor's recommendation of probation, which was given. There was no breach of a plea bargain, only the failure of the Petitioners' expectation of probation.

III.

The Texas Admonishment Statute, Art. 26.13 Of the Texas Code Of Criminal Procedure, Is Not Applied In An Unconstitutional Manner By The Texas Courts.

The Petitioners present nothing but a generalized attack on the constitutionality of Art. 26.13, Texas Code of Criminal Procedure. As the discussion above indicates, these Petitioners have failed to establish facts which would in any way show that, *as to them*, the statute was applied in an unconstitutional manner; consequently, Petitioners lack standing to raise the issue.

Further, the Petitioners failed to raise this issue in the court below, as an examination of the briefs will disclose. Since the Texas Court of Criminal Appeals has not yet had the opportunity to pass on the Petitioners' claims, this Court should abstain from doing so.

CONCLUSION

For all the reasons stated above, and for the further reason that the criteria set forth in Supreme Court Rule 19 governing the exercise of this Court's discretionary *certiorari* jurisdiction have not been met, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Respondent, and do hereby certify that three copies of the foregoing Respondent's Brief in Opposition have been served by placing same in the United States Mail, first class, certified and postage prepaid, on this the _____ day of

August, 1976, addressed to Friloux, Woolf, Smith & Abney, C. Anthony Friloux, Jr., Gerald A. Woolf, 1115 First National Life Building, Houston, Texas 77002.

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